LEGAL DETERRENTS*

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I SHALL begin by discussing first one, then a number of the mechanisms by which the homicide rate, at least in theory, can be reduced.

The most obvious way that appeals to a lawyer is very different from the public health perspective. One way to reduce the frequency of a behavior is to punish the people who engage in that behavior. This is not so far fetched. Everyone of us who has brought up children knows that, at least to some extent, under some circumstances, this works. One theory is that to cut down on the amount of homicide in a society, a good way is to punish the people who do that sort of thing.

That particular prescription, however, is very different from the issue discussed here before. It does not argue whether or not we deter homicide more by punishing it with the death penalty than by punishing it the way we do or perhaps other methods that we could use but do not.

With respect to the death penalty, despite today's paper, the evidence I have studied leaves that question at very best in doubt and, frankly, inclines me to be very dubious of the idea that the death penalty deters homicide under American conditions today.

The problem with the regression analysis studies are manyfold. But two of them strike me as really important. One is that homicide changes over time in response to a great many conditions that are not accounted for. One of the most obvious ones is the availability of guns, another is drug use, availability of drugs and commercialization of illegal drug traffic. We could say, "Well, we would expect that. There are a lot of random variations we don't understand in the homicide pattern. Nonetheless, we get a substantially significant result when we do homicide versus capital punishment studies, and the other variables shouldn't affect that."

However, if we look more carefully, basically what happened is, from

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about 1934 to, let us say, 1960, the homicide rate generally went down and the capital punishment rate went down too. It was pointed out many times in comments on Isaac Ehrlich's study that from 1934 to 1960 there was essentially no relation between capital punishment and homicide. Around 1960 homicide goes way up, capital punishment continues to go way down in response to various other secular and legal trends. Ask what the fact that homicide increases very much and capital punishment decreases very much during this period will do to the regressions? It will convince us that capital punishment has an effect on homicide, which to my view is just simply unjustified there. Two likely quite different effects are happening at the same time and I draw some confidence in this from the fact that during the previous 30-odd years we do not find that correlation at all.

What happens later? Much later than the Ehrlich study, after a period of time homicides decrease, as during the last four years, and capital punishment becomes more frequent. We can say that one affects the other. My guess is that there is an effect, and that is the other problem. To a certain extent, very likely homicide produces capital punishment more than capital punishment lowers the homicide rate. The reason for that is political.

Why do we reinstitute capital punishment when most people had thought that it was on the way out? Why the reinstitution when the Supreme Court and various political bodies did not seem at all enthusiastic about it? The answer is that the public very sharply reacted to the increased homicide rate and demanded law and order, war on crime and a tough posture to teach criminals something. This reaction is delayed because it takes political bodies some time to react, especially the judicial bodies, to the election returns.

If we look more carefully, the largest increase in capital punishment occurred during the last year or so and the murder rate turned down about three years ago. My guess is that the reflection of the downturn in the murder rate, which may very well continue, upon the capital punishment rate may take 10 years to register and to reduce the number of executions because these developments have a long time lag. I do not think that any regression study can grapple with these two problems and particularly with the long-term trends which, in a sense, are unresponsive to any of the variables we have mentioned.

We also have the problem Frank Zimring raised earlier that infects almost all of the studies. It is wrong to measure capital punishment and homicide in the United States as a whole when 37 or so states have not had an execution since 1967 or earlier. If everything else were completely random, it

would just dilute the effect. But everything is not random, and all sorts of changes are taking place for which we cannot really account.

On the other hand, although the issue of marginal deterrence of capital punishment over, say, life imprisonment is an open one, a number of things can be said about it. One of them is the idea that it just makes sense that higher punishments do deter people. And in fact we can show with some degree of confidence that the higher the arrest rate for a crime, the lower the rate of that crime within certain limitations.

One can argue that again here causation is reversed, and that all this means is that the more crimes we have, the more likely the criminal justice system is to be overwhelmed and therefore the arrest rate will decline. But, even assuming that, it probably is also true that the higher the arrest rate, all other things being equal, the lower the crime rate. What we find is, similarly, that the higher the punishment the lower the crime rate, but much less consistently and impressively.

One thing that very few people have investigated with any thoroughness, though there are some data on it, is that punishments for homicide, entirely apart from the frequency of the death penalty, have, by and large, decreased over the years—although they have taken a turn recently in the other direction. In other words, what happened was that during the entire period that capital punishment was declining, which may have had very little effect, if any, on the homicide rate, the punishments for homicide in terms of years of imprisonment were also declining, and this may have had a significant effect.

MR. MICHAEL SMITH: What about the arrest rates?

DR. KAPLAN: Arrest rates also declined, but not so dramatically. Of course, one can argue that it should not make sense that capital punishment would be more deterrent than life imprisonment. We perceive an increase in severity when one goes from life imprisonment to the death penalty. Perhaps this does have some effect.

On the other hand, capital punishment also has other effects that push in the opposite direction or at least can be expected to push in the opposite direction. We do have some data on a small number of cases where people have committed homicide because of capital punishment. We had a case near Stanford where a depressed baby sitter killed her two charges because she wanted to get capital punishment and thought that suicide was against her religious convictions. Of course, those are exactly the people who do not receive capital punishment in our society—middle class mental cases—but they do con-

tribute to the homicide rate.

Similarly, the very message that capital punishment broadcasts in a society—that it is an appropriate method of resolving disputes to kill one of the disputants—is something that may have effects, even though one of the disputants is the state. Many people feel that an appropriate method of handling people who have done something wrong is to kill them, and this may have an effect that may very well cancel whatever deterrent effect capital punishment has over life imprisonment. Frankly, we have no statistical evidence of this, although some episodic cases support such a view.

Putting aside the punishment of homicide, deterrence has a much more important effect on the homicide rate simply by deterring other things that we know involve a significant risk of homicide, such as robbery, assault and perhaps involvement in drugs. In all these areas the evidence is that deterrence by imprisonment does some good. We would expect that deterring these, as it were, precursors of homicide may in fact be more effective than many of the other public policy options that we in fact select. And, of course, as already mentioned, it might very well be that deterrence of homicide by higher arrest rates and more severe punishment may be effective entirely apart from whether one punishes by execution.

In addition, as Frank Zimring mentioned, we use our criminal law deterrence mechanism to deter things we usually do not think of as crimes. Restriction on the possession of guns and the use of alcohol help, but not as powerfully as we would like.

Another mechanism of the criminal law has not been mentioned at all here, which is to my mind quite remarkable. Criminal law, we are told, works through deterrence, in other words, through scaring the population by making it clear that the rewards of criminal behavior have to be discounted by the chances of punishment. Another major mechanism by which the criminal law reduces crime is isolation, which simply means locking up people so that they cannot do any more harm.

Interestingly, capital punishment, though sometimes defended as an important means of isolation, is not that. It certainly does the job beautifully for each individual executed. The recidivism rate among those executed is zero. On the other hand, we do not execute very many and in fact no advocate of capital punishment favors executing a very significant percentage of the people who commit homicide. There are simply too many of them. We have never executed more than about 200 or so. What is the number since 1930?

DR. WOLFGANG: The highest is 199.

DR. KAPLAN: We have 20,000 killings a year.

It turns out, however, that the isolation of people who have been convicted of homicide, even apart from executing them, is not a very serious problem. Either they are kept in prison so long that they cease to be dangerous (if necessary, for their lifetimes) or we think we are able to tell who will be dangerous, which I frankly doubt. In any event, the recidivism rate among those convicted of murder when they are released is of the order of 1 in 300. In other words, one in 300 of the people who are released after a conviction of murder do it again. That is obviously not a major contribution to the homicide problem.

On the other hand, our prisons today hold about 460,000 people. I remember when it was a little less than half of that in 1970. Among these people are a great many very dangerous people. Not the entire prison population of course. Some are in there simply because of retribution. They may not be at all dangerous, but they have done something bad enough that we want them locked up simply because our moral feelings demand punishment.

A number of murderers are in this category such as the spouse killers who have had grinding relationships for 30 years, which may end in murder. It may be that these people are not significantly dangerous thereafter. There may be other kinds of crimes, too, where people have done something we regard as horrible even if in fact we do not think of the perpetrators as dangerous.

Many people are in prison for a combination of retribution and deterrence, having nothing to do with their dangerousness. This is true of the typical white collar offender, tax evader, embezzeler, stock fraud manipulator. It may even be true of a sizable percentage of those in prison for drug trafficking, although, of course, many drug traffickers are extremely dangerous and people trafficking in heroin almost certainly have to be dangerous to stay in business.

The marijuana traffic is to a sizable extent a comparatively "soft" business—at least in the United States—with low involvement of organized crime and low use of violence as a method of settling disputes, and, indeed, even of protection. As the government leans harder on marijuana and as more efforts are made to repress domestic traffic in that drug we shall get more violence associated with the trade because government energies to suppress a drug put a premium on the use of violence in protection, intimidation of witnesses and doing other things that organized crime is much better at than are a lot of acquisitive hippies, which has been a sizable portion of the marijuana trade. We see that already in what has happened when people going

into the marijuana growing business in various areas of California and elsewhere soon realize they have to be quite heavily armed for protection.

In any event, apart from these people, many very dangerous people are already in the prison system. My guess is that their danger is often underestimated. Most of them, of course, have not committed homicides. Robbery, rape and the very criminal drug trade are probably the major sources of these very dangerous people, many of whom you may be sure would in fact kill if they were released.

There are two complicating factors here, however. One is that people get much less dangerous as they grow older. Therefore, over time if no one were released or added, which amounts to about the same thing since our prisons are already full, our prison population would become older and less dangerous. Each person in prison is, of course, already older than when sentenced there and certainly than when he committed his crime. However, people become less dangerous at varying rates. There is no way to know for sure the dangerousness of people in prison as a function of their age and time imprisoned.

It is clear that the marginal benefits of imprisoning most people for an extra year are not as great as the benefits of the previous year they have been in prison. But of course there is within this group a sizable number of people, though by no means a majority—perhaps as low as 5 or 10%—who are extremely dangerous and will continue to be. If we only knew more about how to detect them, we might have a sizable effect on our homicide rate and, indeed, our criminal rate in general, simply by keeping them locked up.

Having talked a little about the criminal law effect upon the homicide rate, I want to talk about what is more within the discipline of public health. The paradigm success was closure of the Broad Street pump. If we were to do that in the area of homicide, what other sorts of things would we look at? Strangely enough, we know relatively little about this.

One of the things we do know, and I suspect that it is even more important than the distribution of economic opportunities, though in some way related to it, are causes that lie deep within the family. Child-rearing practices such as discipline that is consistent and not too harsh, and the presence of somebody in the very earliest years of a child's life with whom the child can form an affectional bond seem to be among the major preventives of individual criminality that we can isolate. What we can do about this, however, is a very difficult problem.

Certainly medical practice can do a little about this. One of the very best

correlations I know about those on death row is the tremendous percentage who were abused as children. Can we do anything about that to get these children out of the homes that abuse them as soon as possible?

Another aspect of this is revealed by asking in what kinds of families would one expect, if not the abuse problem, then at least the problem of affectional bond and consistent discipline to be most serious. My guess would be that it would be in one-parent families, particularly among the illegitimate children of teenagers. Children of a mother completely unprepared for and overwhelmed by motherhood can hardly expect competent, consistent mothering. I would expect also that these would be the children who suffer from lowest birth weights and whose nervous systems are most irritable; and we have a good deal of information on the biological bases of crime and homicide that indicate that hyperirritable people are indeed at greater risk of engaging in violent criminality.

The problem of illegitimate children is an enormously difficult one, but not one that can be solved by wide availability of birth control devices or even of abortion, because we have learned fairly recently that many mothers of illegitimate children want the babies. How to change their values and the rewards and satisfactions they seek is one of our greatest domestic challenges.

This is a matter of enormous importance. Women, often of high school age, who bear children at the time when they cannot be effectively socialized must be persuaded to wait—although we do not have many ideas about how to do this. Moreover, their children are more likely to be abused. One is struck by the number of cases where the mother's live-in boy friend, not the father of the child, is guilty of child abuse. If we can get a handle on this—and my guess is that public health authorities are in a far better position to do something about these problems than criminal law officials—we shall have taken a major step forward.

Other areas should be considered. The school system, the distribution of social services, the encouragement of self-help groups at a later period in life seem to have some "turn around" effect. But charismatic leaders who can actually influence adolescents and young adults are not very reproducible. There is no doubt it can be done, but finding people who can do it effectively and consistently, though certainly worth doing, strikes me as less of a long-term and hopeful solution than intervention at a very much earlier age.